Supreme Court, U.S.
FILED
JAN 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-179 and 86-401

# In the Supreme Court of the United States

OCTOBER TERM, 1986

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CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, ET AL., APPELLANTS

*v.*

CHRISTINE J. AMOS, ET AL.

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UNITED STATES OF AMERICA, APPELLANT

*v.*

CHRISTINE J. AMOS, ET AL.

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*ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH*

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## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, which exempts all activities conducted by religious organizations from the statutory prohibition against discrimination in employment on the basis of religion, is invalid under the Establishment Clause of the First Amendment to the extent that it exempts the secular activities of such organizations from the prohibition against religious discrimination.

## PARTIES TO THE PROCEEDING

The parties to this proceeding are identified in the jurisdictional statement filed by the private appellants in this case, *Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints* v. *Amos*, No. 86-179 (at ii).

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**BRIEF FOR THE UNITED STATES**

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## OPINIONS BELOW

The order and final judgment of the district court (J.S. App. 83a-87a) is unreported.[1] The prior opinion of the district court granting in part appellees' motion for summary judgment (J.S. App. 88a-122a) is reported at 618 F. Supp. 1013. The prior opinion of the district court denying the private appellants' motion to dismiss (J.S. App. 1a-82a) is reported at 594 F. Supp. 791.

## JURISDICTION

The judgment of the district court was entered on May 16, 1986. The private appellants filed a notice of appeal to this Court on June 9, 1986 (J.S. App. 130a), and their appeal was docketed on August 4, 1986. The United States filed a notice of appeal to this Court on June 13, 1986 (86-401 J.S. App. 1a-2a). On August 6, 1986, Justice White issued an order extending the time within which to docket the government's appeal to and including September 11, 1986, and the appeal was docketed on that date. On November 3, 1986, this Court issued an order consolidating the two cases and postponing further consideration of the question of jurisdiction until the hearing of the cases on the merits. The jurisdiction of this Court rests upon 28 U.S.C. 1252.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment of the United States Constitution provides in pertinent part:

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[1] "J.S. App." refers to the appendix to the jurisdictional statement filed by the private appellants, *Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints* v. *Amos*, No. 86-179.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

2. Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, provides:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

## STATEMENT

1. The Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints (CPB) and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints (COP), conduct a variety of activities on behalf of The Church of Jesus Christ of Latter-day Saints.[2] One of these activities is the operation of the Deseret Gymnasium, a recreational facility located in Salt Lake City, Utah, that is open to the general public and is used for physical exercise and athletic games. The gymnasium was constructed on property owned by the CPB with funds supplied by the COP. Moreover, the gymnasium has no independent financial existence; purchases and hiring for the gymnasium

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[2] The CPB and the COP are corporations organized under Utah law (J.S. App. 2a-3a). They are under the direct control of the Church's religious leaders. See Affidavit of Dallin H. Oaks, dated April 12, 1985, at 2-3; Affidavit of J. Richard Clarke, dated April 12, 1985, at 2-3.

are conducted under the auspices of the COP, and the COP absorbs the gymnasium's operating losses. Finally, with the exception of the portion of the gymnasium leased to outside franchisees, the gymnasium is exempt from real estate taxes on the ground that the premises are used exclusively for charitable and religious purposes. J.S. App. 2a-4a, 11a-15a, 94a; Affidavit of Leon Heaps, dated June 10, 1983, at 2; Affidavit of Leon F. Olsen, dated June 12, 1983, at 3; Supplemental Answers to Plaintiffs' Third Set of Interrogatories at 28, 35.

The operation of the gymnasium also is tied to the Church. The gymnasium's governing board is appointed by the Church's religious leadership and is composed of church officials. Although the work of the gymnasium's employees is not part of the Church's worship or ritual, the purpose of the gymnasium is to provide a place at which Church members and other persons "may participate in athletic activities in an atmosphere expressive of [the Church's] moral and health standards." Supplemental Answers to Plaintiffs' Third Set of Interrogatories at 27-28; see also Heaps Affidavit at 2. The Church makes the gymnasium's facilities available to charitable and social organizations as part of the charitable service that is a "primary tenet" of its religious doctrine. Supplemental Answers to Plaintiffs' Third Set of Interrogatories at 28; see also Heaps Affidavit at 3.

Under the Church's doctrine, "[t]he most sacred ceremonies * * * are performed in Temples. Unlike the Church chapels and meetinghouses, which are used for public worship on the Sabbath and for Church activities throughout the week, Temples are open only to certain eligible members of the Church" (Affidavit of Dallin H. Oaks, dated April 12, 1985,

at 5). A member's eligibility to enter a Temple is documented by a card called a "temple recommend." To obtain a temple recommend, the member is interviewed by Church officials "to determine whether [he] sustain[s] the leadership of the Church and [is] living according to Church doctrine and standards" (*id.* at 7). The requirements for obtaining a temple recommend thus include observance of dietary laws, attendance at religious ceremonies, and tithing to the Church of one tenth or more of the member's income.

The record indicates that since 1969 the Church's policy regarding employment at several Church-owned activities—including the Deseret Gymnasium—has been governed by the following considerations:

a. Employees of the Church are expected to uphold the standards of the Church both on and off the job.

b. Many people judge the Church by the actions and attitudes of one of its employees. The mere fact that an individual is employed by the Church signifies to others that his actions are condoned by the Church. Therefore, off-the-job standards reflect greatly on the Church's reputation.

c. Continued employment in the Church is dependent on the employees living their lives so as to be worthy of a temple recommend.

Affidavit of John Russell Homer, dated April 12, 1985, at 3.[3] Among the reasons for this employment

[3] There have been isolated exceptions to this policy in connection with gymnasium employees, such as one occasion on which a Church member could not be found with the requisite

policy are that "[s]alaries paid Church employees are obtained primarily from contributions from members of the Church donated to support Church activities. The Church believes that it should benefit members with employment possibilities in which those contributed funds are expended"; and that "[t]he eligible member's belief in the doctrines and tenets of the * * * Church develops a special commitment to the inspired leadership of the * * * Church and gives all * * * Church activities the advantage of a committed, loyal work force." Supplemental Answers to Plaintiffs' Third Set of Interrogatories at 18-19.[4]

Appellee Frank Mayson was employed at the Deseret Gymnasium as an engineer responsible for maintaining the building's physical plant. In 1980, the Church initiated a review of its employees to determine whether its personnel policy was being followed. Mayson states that the director of the gymnasium informed him that he had not qualified for a temple recommend because he was not attending church services regularly or contributing his tithing to the Church and that he would lose his job unless he qualified for a temple recommend within six months.

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skills. Supplemental Answers to Plaintiffs' Third Set of Interrogatories at 18; see also Affidavit of Robert Borchert, dated April 12, 1985, at 2 (non-Church member hired and subsequently discharged). As of June 1983, all gymnasium employees were Church members who "have complied or are complying with Church employment eligibility policies" (Heaps Affidavit at 3).

[4] The Church apparently does not apply this employment policy to the profit-making, tax-paying entities that it controls. Affidavit of Wayne Nelson, dated April 12, 1985, at 3.

Mayson did not qualify and was discharged on April 10, 1981. J.S. App. 3a-4a, 17a, 119a; Homer Affidavit at 4; Affidavit of Arthur Mayson, dated August 16, 1983, at 4-5, 7.

2. Mayson and several other individuals who lost jobs in Church activities because they did not obtain a temple recommend subsequently commenced this action against the COP and the CPB in the United States District Court for the District of Utah.[5] The

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[5] The complaint was styled as a class action, but the district court did not certify a class. The other individual plaintiffs included appellees Christine J. Amos, Judy L. Bawden, Deniece Kanon, April Joyce Riding, Ruth Arriola, and Shelleen Adamson, who were employed as seamstresses at Beehive Clothing Mills, a Church owned and operated establishment that manufactures sacred garments worn by Church members in religious ceremonies. Each of these individuals was discharged after she failed to satisfy the requirements for a temple recommend. J.S. App. 3a-4a. The district court did not resolve these appellees' claims because it found that disputed issues of fact precluded a determination on motion for summary judgment regarding whether Beehive constitutes a religious or a secular activity (*id.* at 18a-19a, 93a-105a).

Appellee Ralph Whitaker was employed by Deseret Industries, a division of the Church's Welfare Services Department, and also lost his job because he failed to obtain a temple recommend (J.S. App. 105a-107a). The district court concluded that "Deseret Industries is a religious activity as there is an intimate connection between Industries and the defendants and the Mormon Church and between the primary function of Industries and the religious tenets of the Church" (*id.* at 116a). The court granted summary judgment in favor of the COP and the CPB with respect to appellee Whitaker's claim, holding that religious activities conducted by religious organizations are exempt from Title VII's prohibition against discrimination on the basis of religion (*id.* at 105a). Appellee Whitaker has not sought review of that determination.

plaintiffs claimed that the discharges for failure to obtain a temple recommend constituted discrimination in employment on the basis of religion in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a).[6]

The COP and the CPB moved to dismiss the action, relying on Section 702 of Title VII, 42 U.S.C. 2000e-1, which states that Title VII "shall not apply * * * to a religious corporation * * * with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation * * * of its activities." The district court denied the motion, holding that Section 702 violated the Establishment Clause insofar as it exempted the secular activities of religious organizations from the provisions of Title VII prohibiting religious discrimination (J.S. App. 1a-82a).

Starting from the premise that religious activities conducted by religious organizations could permissibly be exempted from Title VII's nondiscrimination mandate, the district court as a threshold matter considered whether the Deseret Gymnasium constituted a religious activity. The court formulated a three-part test for determining whether an activity conducted by a religious organization is "religious" or "secular." It first evaluated "the tie between the religious organization and the [gymnasium] with regard to areas such as financial affairs, day-to-day operations and management" (J.S. App. 10a). Observing

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[6] The statute bars an employer from "discharg[ing] any individual * * * because of such individual's * * * religion" (42 U.S.C. 2000e-2(a)(1)). The plaintiffs also argued that the discharges violated the parallel provision of the Utah anti-discrimination statute, Utah Code Ann. § 34-35-6(1) (Supp. 1986).

that Church officials appoint the members of the governing board of the Deseret Gymnasium and that the gymnasium has no financial existence independent of the COP (*id.* at 11a-12a), the court concluded that "there is an intimate connection between Deseret and the defendants and the Mormon Church" (*id.* at 12a).

The court next considered whether there was "a clear relationship between the primary function which Deseret performs and the religious beliefs and tenets of the Mormon Church or church administration" (J.S. App. 13a). It found that "[a]lthough the Mormon Church has expressed its desire that members of the Mormon Church engage in physical exercise and [has] attempted to provide a facility to accommodate that desire in an atmosphere which exemplifies its beliefs, the function of Deseret is far from closely related to any religious beliefs or tenets of the Mormon Church or church administration" (*id.* at 16a (footnote omitted)). The court concluded that the Deseret Gymnasium instead serves the same functions as other gymnasiums.

Finally, because it had found no close connection between the gymnasium and church doctrine or administration, the court inquired further concerning appellee Mayson's particular job. It found that "[n]one of [Mayson's] duties is even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration" (J.S. App. 17a). It therefore concluded that the operation of the gymnasium did not constitute a religious activity.

Turning to the question whether the application of Section 702 to a religious organization's secular activities violates the Establishment Clause, the district court evaluated the constitutionality of Section 702

by utilizing the three-part test prescribed by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The district court first found that the 1972 amendment to Section 702 extending the exemption to all of the activities of religious organizations was supported by the secular purpose of limiting government interference with religious activities. The court observed that "[t]he legislative goal of assuring that the government remains neutral and does not meddle in religious affairs by interfering with the decision-making process in religions is a valid secular purpose. Furthermore, there is no indication that Congress amended section 702 for a religious purpose or to promote religion or religious beliefs" (J.S. App. 40a (footnote omitted)).

The court concluded, however, that Section 702 failed the second part of the *Lemon* test because the provision has the primary effect of advancing religion. The court acknowledged that " 'the limits of permissible state accommodation of religion are by no means co-extensive with the noninterference mandate of the free exercise clause' " (J.S. App. 42a-43a, quoting *Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970)), but it stated that "if a statute goes beyond what is mandated by the free exercise clause in accommodating religion, the statute may no longer maintain the requisite course of constitutional neutrality" (J.S. App. 43a). The court then determined (*id.* at 43a-58a) that the exemption of the secular activities of religious organizations from Title VII's prohibition against religious discrimination is not necessary to avoid excessive government entanglement with religion and is not compelled by the Free Exercise Clause.

The court also found that Section 702 lacks "characteristics that the Supreme Court has looked to in

declaring statutes valid as against claims of establishment clause violations" (J.S. App. 66a). It observed that the exemption did not extend to "a broad spectrum of groups" but was limited to religious organizations (*id.* at 61a), the exemption was not supported by historical tradition or by any threat of hostility to religion, and the exemption was not justified by the concerns underlying the Free Exercise Clause (*id.* at 66a-69a). The court found that Section 702 instead amounts to government sponsorship of religion because it allows religious organizations to increase their influence over the secular economy and "grant[s] religious organizations an exclusive authorization to engage in conduct which can directly and immediately advance religious tenets and practices" (J.S. App. 70a).

Finally, the district court applied the third prong of the *Lemon* test, considering whether Section 702 fostered excessive government entanglement with religion. The court found that the exemption enables a religious organization to exercise "coercive power" over the religious beliefs of its employees, and that this "potential for impermissible fostering of religion" supports a "finding of excessive entanglement" (J.S. App. 74a). The court observed, however, that "Section 702 does not require the type of comprehensive, discriminatory and continuous state or federal surveillance that was condemned in cases such as *Lemon*. * * * On the contrary, this exemption was designed to minimize involvement and entanglement between church and state and to ensure that the government and courts do not go through the rigors of inspecting and analyzing whether the activities in which a religious entity is engaging are religious or secular, thus avoiding an intimate and continuing

relationship between church and state" (J.S. App. 74a-75a (footnote omitted)).

The court concluded that it was not necessary to balance the three *Lemon* factors. It found that "the direct and immediate effect of the exemption of religious organizations from Title VII for religious discrimination in secular, non-religious activities is to advance religion in violation of the establishment clause of the first amendment to the United States Constitution" (J.S. App. 75a).[7] Implicitly holding that the discharge of appellee Mayson was the result of religious discrimination, the court concluded that the discharge violated Title VII. It ordered the reinstatement of appellee Mayson and awarded back pay with interest (J.S. App. 116a-120a). On January 22, 1986, the court entered a final judgment in favor of appellee Mayson under Rule 54(b) of the Federal Rules of Civil Procedure (see J.S. App. 128a).

The district court vacated this judgment on February 4, 1986, and on February 5 issued an order (J.S. App. 127a-129a) certifying to the Attorney General of the United States that the constitutionality of Section 702 had been drawn into question in the present case (see 28 U.S.C. 2403(a)). The United States intervened and filed a brief defending the constitutionality of Section 702. Following a

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[7] The court indicated that its "determination regarding [Section 702] applies with equal force to the [parallel] state law exemption as it relates to the facts of this case" (J.S. App. 8a). It declined to address appellees' arguments that the application of Section 702 to secular activities violates the due process and equal protection principles embodied in the Fifth Amendment (J.S. App. 76a), and it dismissed appellees' state law claims for wrongful discharge and intentional infliction of emotional distress (*id.* at 77a-82a).

hearing, the district court reaffirmed its prior determination and again entered a final judgment in favor of appellee Mayson. J.S. App. 83a-87a.

## SUMMARY OF ARGUMENT

The statutory provision at issue in this case, Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, embodies Congress's determination that its prohibition of religious discrimination in employment should not be applied to the employment practices of religious organizations. The district court erred in concluding that the Establishment Clause bars Congress from accommodating religion in this manner and instead requires Congress to apply that prohibition when a religious employer's hiring decisions relate to its secular activities.

This Court repeatedly has recognized government's authority to lessen burdens on religious practice and thereby enhance the ability of religious institutions and religious individuals to conduct themselves in accordance with their beliefs. While the Free Exercise Clause obligates government to accommodate religion in some circumstances, it does not exhaust the possibilities of permissible governmental accommodation of religion. Indeed, the Establishment Clause itself is a guarantee of religious liberty, ensuring that government will not interfere or become entangled with religion.

Exemptions from obligations imposed by government upon the public at large—such as the tax exemptions available to religious institutions—constitute perhaps the most familiar type of accommodation of religion. By removing the church from the interfering influence of the state, such exemptions typically further the central goal of both of the Religion Clauses: "to prevent, as far as possible, the

intrusion of either [the church or the state] into the precincts of the other" (*Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971)).

Section 702 closely resembles the exemptions of this sort previously approved by this Court. Congress concluded that the application of the antidiscrimination rule to religious institutions might well result in a conflict with religious belief. It also recognized that a narrower exemption would require government inquiry into religious beliefs, government investigation of religious activities, and difficult decisions regarding religious justifications for religion-based hiring, and adopted a broad exemption that avoids these entangling effects. By seeking to prevent government interference with religion, and selecting the legislative course most likely to avoid such entanglement, Congress surely did not violate the Establishment Clause.

In addition, Section 702 does not result in the sort of affirmative involvement of the state in religious activity that is forbidden by the Establishment Clause. Thus, Section 702 is neutral among religious denominations, does not confer government power upon religious organizations or convey a message of government endorsement of religious organizations, does not provide government financial support for religious activities, and does not authorize the use of government power to coerce an individual's religious choice.

The foregoing demonstrates that Section 702 satisfies the test established by this Court in *Lemon* v. *Kurtzman*, *supra*. Congress's purpose of accommodating religious organizations comports with the goal of avoiding interference of government with religion that lies at the heart of the Religion Clauses, and is

therefore entirely lawful. Similarly, the sole effect of the statute, which is to accomplish that accommodation, does not violate the Constitution. Finally, Section 702 minimizes rather than aggravates the possibility of government entanglement with religion. The *Lemon* test therefore confirms that Section 702 is a permissible accommodation of religion.

## ARGUMENT

### SECTION 702 DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

Title VII of the Civil Rights Act of 1964 prohibits an employer from "discharg[ing] any individual * * * because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. 2000e-2 (a)(1)). Section 702 of the original Act partially exempted religious organizations from this general rule, providing that the antidiscrimination requirement does not apply to a religious organization "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [organization] of its religious activities" (42 U.S.C. (1964 ed.) 2000e-1).

Congress altered the religious organization exemption in 1972, broadening it to apply to both the secular and the religious activities of religious institutions. See Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972). Under the amended version of Section 702, a religious organization is free to take religion into account in all of its personnel decisions. 42 U.S.C. 2000e-1; see S. Conf. Rep. 92-681, 92d Cong., 2d Sess. 16 (1972) (the amendment "expanded the exemption for religious organizations from coverage [under Title VII] with respect to the employment of individuals of a particular religion in all their ac-

tivities instead of the present limitation to religious activities"); 118 Cong. Rec. 7167 (1972) (section-by-section analysis of bill reported by the conference committee).

The legislative history reveals that Congress amended Section 702 in order to prevent government interference with religious institutions.[8] Senator Ervin, one of the principal sponsors of the amendment, observed that limitation of the exemption to a religious organization's religious activities "would split the activities of a religious organization into two segments, although they are irretrievably held mainly by the organization itself," and permit government oversight of the organization's employment decisions with respect to employees who did not "work strictly in the religious field" (118 Cong. Rec. 1977 (1972)). He argued that "[w]hen the Federal Government begins to grasp the power of things of the Lord, it is reaching a state of governmental intemperance which is alien to the first amendment" (*ibid.*). Senator Ervin concluded that Congress was not "securing religious liberty from the invasion of the civil authorities when [it] give[s] the civil authorities power to regulate whom religious institutions * * * can employ, whom they must promote, whom they must retain in employment, and whom

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[8] The Senate debated several proposals concerning the religious institution exemption, including an amendment that would have exempted religious organizations from all of the antidiscrimination requirements of Title VII. Some of the comments discussed in the text are taken from the debate on these broader proposals. Senators Ervin and Allen sponsored both the broader and the narrower measures, and their comments therefore are relevant in ascertaining the purpose of the exemption that was adopted by Congress.

they may fire." *Id.* at 1979; see also *id.* at 946-949 (remarks of Sen. Allen).

Senator Ervin also noted the problems that would be encountered in attempting to distinguish a religious organization's religious activities from the organization's secular activities. He observed that the limited religious institution exemption "attempt[ed] to do an impossible thing, that is to separate the religious activities of a religious [organization] * * * from those of its activities which can be said to be not religious, nonreligious, or unreligious" (118 Cong. Rec. 1973 (1972)).

### A. Section 702 Is A Permissible Accommodation Of Religion

The question in the present case is whether Congress's decision to expand Section 702 in order to prevent government interference with religious institutions constitutes an establishment of religion violative of the First Amendment. We do not assert that the amendment of Section 702 to encompass all activities of religious institutions was required by the Free Exercise Clause. The statutory provision does, however, further the values embodied in both the Free Exercise and Establishment Clauses, and does not run afoul of the limitations upon government action imposed by the Establishment Clause. We believe, therefore, that Section 702 is a valid exercise of the government's discretionary authority to accommodate religious beliefs and institutions.[9]

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[9] In its November 3, 1986 order in these cases, the Court postponed further consideration of the question of jurisdiction to the hearing of the cases on the merits. The district court initially entered judgment in favor of appellee Mayson on January 22, 1986, but that order was vacated on February 4,

### 1. *This Court Has Made Clear That Government May Accommodate Religion Through Exemptions From Generally Applicable Regulatory Standards*

The "first and most immediate purpose [of the Establishment Clause] rested on the belief that a

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1986, pursuant to a timely motion for reconsideration filed by the private appellees under Fed. R. Civ. P. 59. We moved to intervene as of right pursuant to Fed. R. Civ. P. 24(a) and 28 U.S.C. 2403 on March 7, 1986, and the district court granted our motion on March 19, 1986; we filed a brief and presented oral argument in support of the constitutionality of Section 702; and the district court issued an order on May 16, 1986 "reaffirming and re-entering" its prior judgment in favor of appellee Mayson. See J.S. App. 83a-87a.

In our view, 28 U.S.C. 1252 plainly supplies jurisdiction over these appeals. That statute provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action * * * to which the United States * * * is a party." All of these statutory requirements are satisfied in the present case. First, the United States became a party to this action prior to the issuance of the order on appeal holding Section 702 unconstitutional. It is settled that intervention by the United States satisfies the statutory requirement that the United States be a "party" to the action. See *ILGWU* v. *Donnelly Garment Co.*, 304 U.S. 243, 249 (1938). Second, the fact that the district court issued a prior order has no effect upon the appealability of the second, effective order. The initial order was vacated pursuant to a timely motion for reconsideration and therefore is a nullity. Moreover, the fact that the district court relied on its prior order cannot prevent review of the judgment of unconstitutionality that is the basis for its second order. Cf. *United States* v. *Clark*, 445 U.S. 23, 25-27 n.2 (1980). Third, this case qualifies as a "civil action"; it was commenced by appellees pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Fourth, the district court held an Act of Congress unconstitutional. It expressly declared Section 702 unconstitutional on its face

union of government and religion tends to destroy government and to degrade religion. * * * The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." *Engel* v. *Vitale*, 370 U.S. 421, 431-432 (1962) (footnote omitted); see also *Abington School District* v. *Schempp*, 374 U.S. 203, 221-223 (1963).

"[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity" (*Walz* v. *Tax Commission*, 397 U.S. at 668). The central goal of the Clauses, therefore, is "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lemon* v. *Kurtzman*, 403 U.S. at 614; see also *Walz* v. *Tax Commission*, 397 U.S. at 669 ("[t]he general principle deducible from the First Amendment and all

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to the extent the statute exempts the secular activities of religious organizations from Title VII's nondiscrimination mandate (see J.S. App. 75a). This holding was necessary to the court's award of relief to appellee Mayson. (Even had the district court held Section 702 unconstitutional as applied to appellee Mayson, this Court would have jurisdiction under Section 1252. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *California* v. *Grace Brethren Church*, 457 U.S. 393, 405 (1982).) Finally, the statute permits "any party" to appeal, and both the United States and the private defendants have appealed to this Court. For these reasons, the Court plainly has appellate jurisdiction over the district court's judgment in this case.

that has been said by this Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion"). Thus, the Establishment Clause no less than the Free Exercise Clause may be seen as a guarantee of religious liberty: the liberty of religion to be free of meddling by the state and of individuals to be free of the compulsion of state sponsored religion. Accommodation to religion in the form of an exemption from government regulation plainly furthers these values, and therefore is most unlikely to offend the Establishment Clause.

a. The Court repeatedly has acknowledged that government may act to lessen burdens upon religious practice and thereby enhance the ability of religious institutions and religious individuals to conduct themselves in accordance with their beliefs. Thus, the Court has observed that "the Constitution * * * affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984); see also *Wallace* v. *Jaffree*, No. 83-812 (June 4, 1985), slip op. 16-18 (O'Connor, J., concurring in the judgment); *Thomas* v. *Review Board*, 450 U.S. 707, 726-727 (1981) (Rehnquist, J., dissenting). "[T]he interrelationship of the Religion Clauses has permitted government to take religion into account * * * to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish." *McDaniel* v. *Paty*, 435 U.S. 618, 638-639 (1978) (Brennan, J., concurring) (footnotes omitted).

This vigorous endorsement of government accommodation of religion has its source in the significant role that religion has played in our society since the founding of the Nation. Our traditions encourage government to act in a manner that enhances an individual's ability to observe his faith. *Lynch* v. *Donnelly*, 465 U.S. at 677-678 (citations omitted) ("evidence of accommodation of all faiths and all forms of religious expression" pervades our Nation's history; "[t]hrough this accommodation * * * governmental action has 'follow[ed] the best of our traditions' and 'respect[ed] the religious nature of our people' "); *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952) ("[w]e are a religious people whose institutions presuppose a Supreme Being"); McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 14-24.

Indeed, the impetus to government accommodation is rooted in the Constitution itself: the Free Exercise Clause embodies a special solicitude for religious liberty, obligating the government to adjust its policies in some circumstances so as to avoid interference with religious institutions. See, *e.g.*, *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 721-722 (1976); *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94, 114-116 (1952); cf. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979). Accommodation by government of religious institutions, far from constituting a forbidden establishment of religion, expresses a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" (*Walz* v. *Tax Commission*, 397 U.S. at 669).

The Court has made clear, moreover, that the government's authority to accommodate religion is not

limited to the measures required by the Free Exercise Clause: "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the revolution itself." *Walz* v. *Tax Commission*, 397 U.S. at 673; see also *Bowen* v. *Roy*, No. 84-780 (June 11, 1986), slip op. 18 & n.19 (opinion of Burger, C.J.); *Wallace* v. *Jaffree*, slip op. 16 (O'Connor, J., concurring in the judgment); *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); *TWA* v. *Hardison*, 432 U.S. 63, 90 (1977) (Marshall, J., dissenting); *Gillette* v. *United States*, 401 U.S. 437, 453 (1971); *Welsh* v. *United States*, 398 U.S. 333, 371-372 (1970) (White, J., dissenting); *McGowan* v. *Maryland*, 366 U.S. 420, 520 (1961) (Frankfurter, J., concurring).

b. The present case concerns the scope of the government's discretionary authority to accommodate religious practice, which is bounded on the bottom by the mandate of the Free Exercise Clause and on the top by the prohibition contained in the Establishment Clause. Since the question here is whether a particular sort of government accommodation of religion —a statute that exempts religious individuals or institutions from an obligation imposed upon other members of society—exceeds the "ceiling" upon permissible government action imposed by the Establishment Clause, it is necessary to consider how the values embodied in the Establishment Clause relate to an accommodation of this type.

An exemption that excuses religious individuals or organizations from a general obligation invariably will have the effect of reducing government interference with religion because it eliminates a govern-

ment-imposed rule that may limit the ability of the individual or organization to follow the tenets of religious faith. By removing the church from the interfering influence of the state, the exemption furthers the purposes of the Establishment Clause—to prevent government entanglement with religion and foster religious liberty. In addition, because the exemption reflects a government decision not to involve itself with religion, explicit exemption is the form of government acknowledgment of religion least likely to constitute forbidden affirmative involvement of the state in religious activity.[10]

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[10] Appellees assert (Mot. to Aff. 19) that this Court frequently has "invalidated or denied" exemptions drawn on religious lines. They attempt to support this position by citing decisions of this Court holding that—in the particular circumstances of each case—the Free Exercise Clause did not *require* the adoption of a religion-based exemption. *E.g., Bowen* v. *Roy*, No. 84-780 (June 11, 1986); *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986); *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985); *United States* v. *Lee*, 455 U.S. 252 (1982). But Congress did adopt such an exemption when it enacted Section 702, and this case therefore presents a different question—whether the Establishment Clause prohibits such an accommodation. Since the Court has made clear that Congress's authority to accommodate religion is not limited to those measures required by the Free Exercise Clause, the decisions cited by appellees interpreting the Free Exercise Clause are obviously beside the point.

*Welsh* v. *United States*, 398 U.S. 333 (1970), another case cited by appellees to support their claim that religion-based exemptions generally violate the Constitution, plainly does not stand for that proposition. A plurality of four Justices decided the case on statutory grounds, concluding that Congress intended to exempt from the draft persons who object to military service on grounds of public policy as well as persons who object on religious grounds (398 U.S. at 335-344). Only Justice Harlan concluded that an exemption limited to persons

The striking congruence between the goals of the Religion Clauses and the likely effects of religion-based exemptions from obligations imposed by government upon the general public strongly supports the constitutionality of such measures. It is not surprising, therefore, that the Court repeatedly has approved exemptions of this type. Thus, the religious accommodations required by the Free Exercise Clause generally take the form of religion-based exemptions. The Court has expressly rejected the contention that such action violates the Establishment Clause. See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. at 234-235 n.22; *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963).

The Court also has approved such exemptions without relying upon the Free Exercise Clause, recognizing that the political branches have discretion to adopt such exemptions without triggering the prohibitions imposed by the Establishment Clause. For example, in *Zorach* v. *Clauson*, *supra*, the Court upheld a statute permitting the release of a student from public school classes so that the student could attend a religious center for religious instruction. The Court observed that "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions," and held that the exemption on religious grounds from the compulsory attendance requirement did not effect an establishment of religion (343 U.S. at 313-314).

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who opposed military service on the basis of their religious beliefs would violate the Establishment Clause (*id.* at 356-361). Three Justices rejected this view of the constitutional issue, concluding that such an exemption would not effect an establishment of religion (*id.* at 369-374 (White, J., dissenting)).

Similarly, in *Walz* v. *Tax Commission*, *supra*, the Court rejected an Establishment Clause challenge to a statute creating a property tax exemption for property owned by religious organizations and used for religious purposes. The Court could not "read [the] statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions." 397 U.S. at 673; see also *Bowen* v. *Roy*, slip op. 18 n.19 (opinion of Burger, C.J.) (indicating that although an exemption from a social security law requirement was not mandated by the Free Exercise Clause, such an exemption would not violate the Establishment Clause); *United States* v. *Lee*, 455 U.S. 252, 260 & n.11 (1982) (indicating approval of statute exempting religious objectors from the obligation to pay social security taxes); *Gillette* v. *United States*, *supra* (upholding exemption from the military draft for conscientious objectors); *Braunfeld* v. *Brown*, 366 U.S. 599, 608 (1961) (plurality opinion) (indicating that Sabbatarian exception to Sunday closing laws would be constitutionally permissible); *Selective Draft Law Cases*, 245 U.S. 366, 389-390 (1918) (upholding exemption from the draft for religious objectors).[11]

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[11] *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), concerned the authority of the National Labor Relations Board over teachers employed in church-operated schools. The Court construed the National Labor Relations Act to exclude coverage of such teachers on the ground that a contrary result would require the Court "to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses" (440 U.S. at 507). Thus, the Court expressly recognized an exemption for religious institutions from a generally applicable regulatory requirement. See also *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981)

### 2. *Section 702 Minimizes Entanglement Between Government and Religion And Effects No Sponsorship or Financial Assistance of Religion*

Section 702 fits squarely within these prior decisions. By exempting religious institutions from a governmentally-imposed burden, it promotes the values embodied in the Religion Clauses. Moreover, Section 702 has none of the effects that this Court has cited in striking down government action under the Establishment Clause. Section 702 therefore is plainly constitutional.[12]

a. As we have discussed (see pages 18-21), the central purpose of the Religion Clauses is to ensure noninterference by government in religion. The Court in *Walz* v. *Tax Commission*, *supra*, upheld the property tax exemption at issue in that case after finding that the exemption (1) "spar[ed] the exercise of religion from the burden of property taxation," thereby eliminating any danger of oppressive government action stemming from hostility to religion, and (2) lessened government entanglement with religion. 397 U.S. at 673, 674-675; see also *Wallace* v. *Jaffree*, slip op. 17 (O'Connor, J., concurring in the judgment) (defining an accommodation of religion as a government action that "lifts a government-imposed burden on the free exercise of religion"); *Marsh* v. *Chambers*, 463 U.S. at 804 (Brennan, J., dissenting) (footnote omitted) (improper government interference with religion may

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(church-run schools exempted from mandatory coverage under Federal Unemployment Tax Act).

[12] We note that Congress and the Executive Branch have adopted other religion-based exemptions similar to Section 702. See *e.g.*, 26 U.S.C. 512(b)(12) and (15); 26 U.S.C. 3309(b); 26 U.S.C. 6033(a)(2)(A); 29 C.F.R. 779.214.

result if government "unduly involv[es] itself in the supervision of religious institutions or officials"). The goal of noninterference of government in religion plainly is furthered by Section 702.

As a threshold matter, Congress's judgment that Section 702 furthers the goal of noninterference of government in religion is entitled to deference. Cf. *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 322-323 (1985); *Gillette* v. *United States*, 401 U.S. at 460. A court should not lightly overturn Congress's conclusions—based upon its assessment of the relevant interests—that its program for combatting religious discrimination in employment should be adjusted to avoid government interference in religion, and that a broad prophylactic exemption is the appropriate means by which to reduce the potential for interference with this aspect of religious organizations' employment decisions. Indeed, where Congress has made a judgment that the government interest underlying a regulatory program does not justify the extension of the regulation to religious organizations, there would appear to be little reason for a court to insist upon the expansion of the regulatory program, thereby triggering government interference with religion that Congress deemed wholly unnecessary to fulfill its underlying purposes.

Moreover, an assessment of the relevant interests indicates that Congress correctly concluded that Section 702 furthers the values of the Religion Clauses by eliminating a source of government interference with religion. The Free Exercise Clause undoubtedly requires government to permit religious organizations to consider religion in connection with some of their employment decisions: clergymen plainly may

be hired on the basis of religion. And a religious organization's employment decisions frequently may be based upon religious belief even if the tasks to be performed by a prospective employee seem wholly secular to an outsider. For example, the organization's religious tenets may impose an obligation to assist members of its own faith in finding employment. In addition, a religious organization plainly has an associational interest in maintaining its cohesiveness; it may wish to serve that interest by limiting employment to coreligionists. A rule barring a religious organization from taking religion into account in employment decisions therefore is likely to burden the ability of the organization to conduct its affairs in accordance with the dictates of its faith and its religious identity and mission.

In the present case, the Church personnel policy that led to the discharge of appellee Mayson rests in part on these considerations (see pages 5-6, *supra*). Indeed, to the extent that the Church's policy is dictated by its religious beliefs, a rule barring the Church from hiring on the basis of religion would implicate the Free Exercise Clause. Section 702 thus promotes religious autonomy, avoids the need for difficult inquiries under the Free Exercise Clause, and eliminates possible government interference with religion by exempting religious institutions from a government regulation that would override their desire to act pursuant to their beliefs.[13]

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[13] Appellees suggest (Mot. to Aff. 14-15, 21) that the government cannot assert a legitimate interest in avoiding this sort of entanglement with religion because Congress has not created similar exemptions in other contexts. The district court observed (J.S. App. 45a-52a) that courts already examine the employment practices of religious institutions in

Limiting the exemption to "religious" activities—the rule adopted by the district court—would interfere with religion by discouraging a religious organization from taking religion into account in employment decisions for jobs which outsiders might view as "secular". The fundamental difficulty with such a rule, which is well illustrated by this case, flows from the uncertainty of the line between religious and secular activities. Thus, the district court concluded that the Church's Welfare Services Department constitutes a religious activity (J.S. App. 116a), but found that the manufacture of sacred garments worn by Church members in religious ceremonies might not be a religious activity (*id.* at 18a-19a, 93a-105a). It is hard to see any clear distinction between these two activities, each of which implicates the Church's religious tenets, but the district court found that disputed facts precluded a finding as to the status of garment manufacturing.

In order to apply an exemption limited to religious activities, moreover, the government would be re-

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connection with Title VII's prohibition against discrimination on the basis of race, color, national origin and sex.

There is no basis for the claim that Congress's decision not to adopt a broad exemption vitiates the justification for the more tailored exemption that it chose to enact. Indeed, Congress's determination was entirely reasonable because, as the district court acknowledged (J.S. App. 51a), it is more probable that employment decisions based upon religion would be tied to the tenets of the religious organization, and claims of religious discrimination are more likely to require government review of religious beliefs, especially where the permissibility of such discrimination turns upon distinguishing between religious and secular activities. Congress was free to enact the limited exemption contained in Section 702 in order to eliminate the most likely source of intrusion upon religious beliefs.

quired to conduct an inquiry into the organization's religious beliefs and examine the characteristics of the activity implicated by each claim of religious discrimination. Second-guessing of a religious organization's view of the dictates of its own religion, government investigation of religious activities, and "the direct confrontation and conflicts that follow in the train of those legal processes" all constitute government interference with religion that Congress could legitimately seek to avoid. *Walz* v. *Tax Commission*, 397 U.S. at 674; *id.* at 691 (Brennan, J., concurring); see also *Widmar* v. *Vincent*, 454 U.S. at 269-270 n.6 (government inquiry "into the significance of words and practices to different religious faiths" would "tend inevitably to entangle the State with religion in a manner forbidden by [this Court's] cases").[14]

An exemption limited to "religious" activities would also mean that religious organizations act at their peril in making religion-based employment decisions. They could never be certain whether the particular activity would subsequently be found to be "religious" rather than "secular." The possibility of liability under Title VII might make a religious organization reluctant to consider religion in its employment decisions even where that approach would later be found wholly permissible on the ground that the activity was in fact religious.

In upholding the tax exemption in *Walz* v. *Tax Commission*, *supra*, the Court observed that "[e]i-

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[14] Such assessments of the religious character of various activities would be conducted not only by courts, but at various levels within the Equal Employment Opportunity Commission, through its broad authority to investigate discrimination complaints (see *EEOC* v. *Shell Oil Co.*, 466 U.S. 54 (1984)).

ther course, taxation of churches or exemption, occasions some degree of involvement with religion" (397 U.S. at 674), and noted with approval that the exemption resulted in a lesser degree of entanglement between government and religion. 397 U.S. at 674-75; see also *Gillette* v. *United States*, 401 U.S. at 457-458. Here, Congress decided that religious institutions' employment decisions should be governed by the rule that is most likely to avoid government interference with religion. Indeed, its decision pretermits the difficult inquiries that would be necessary under a narrower rule. Section 702 therefore furthers the noninterference of government in religion that is the purpose of the Religion Clauses.[15]

b. Moreover, Section 702 does not amount to " 'sponsorship, financial support, and active involvement of the sovereign in religious activity' " that is forbidden by the Establishment Clause. *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 772 (1973) (citation omitted); see

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[15] Our discussion of the burdens upon religious organizations that would result from the elimination or narrowing of Section 702 should not be taken to indicate that we believe that these burdens are sufficient to implicate the Free Exercise Clause in every case. That inquiry, of course, turns upon whether the government action prevents an individual or organization from practicing its religion. See *Wisconsin* v. *Yoder*, 406 U.S. at 215-219. This Court's recognition of government's authority to accommodate religion where accommodation is not required by the Free Exercise Clause makes clear that government may act to avoid interference with religion that falls short of a violation of the Free Exercise Clause. There is no reason to construe the Constitution to *prevent* Congress from obviating Free Exercise Clause inquiry in a class of cases when it deems government intrusion unnecessary.

also *School District* v. *Ball*, No. 83-990 (July 1, 1985), slip op. 7.[16]

First, Section 702 is neutral among religions. "The clearest command of the Establishment Clause," this Court has stated, "is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); see *Gillette* v. *United States*, 401 U.S. at 449. One important aspect of neutrality is that the government not "confer any imprimatur of state approval on any religious sects or practices." *Widmar* v. *Vincent*, 454 U.S. at 274. Thus, a governmental accommodation to religion might be invalid if it discriminated among religions or if it amounted to an endorsement of a particular religion.

The exemption contained in Section 702 does not breach this requirement because it is available to all religious organizations; the statute makes no distinction on the basis of belief. Although the provision does treat religious organizations differently from other organizations, that fact alone cannot amount to prohibited government sponsorship of religion. All accommodations of religion would otherwise be barred by the Establishment Clause and the special solicitude for religion expressed by the Free

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[16] It is noteworthy that even if Section 702 were limited to religious activities—an exemption that the district court found to be constitutional—its effects would be the same as Section 702 in its present form, and would differ only in the number of jobs affected. It is difficult to believe that this difference in degree dictates a different outcome of the Establishment Clause analysis, because "[t]he crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion" (*Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971) (plurality opinion)). See also note 22, *infra*.

Exercise Clause would itself constitute a constitutional anomaly. The well-settled principle of accommodation of religion (see pages 20-25, *supra*) therefore makes clear that a distinction of this type does not offend the Establishment Clause.[17]

Second, Section 702 does not promote the "symbolic union of church and state" (*School District* v. *Ball*, slip op. 16), or make "adherence to a religion relevant in any way to a person's standing in the polit-

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[17] The district court indicated (J.S. App. 61a, 66a-67a) that Section 702 violated the Constitution because the exemption does not extend to "a broad spectrum of groups," but is " 'limited to religious institutions' " and because Section 702 is not supported by an "historical tradition." The Court in *Walz* did cite these factors in upholding the tax exemption at issue in that case (see 397 U.S. at 673, 675-678). However, it is difficult to see how those factors could be controlling because they have not been present in other cases in which this Court has indicated that a discretionary accommodation of religion would not violate the Establishment Clause. See pages 24-25, *supra*.

Moreover, similar factors are present here. Title VII contains a variety of exemptions designed to serve various public policies. See, *e.g.*, 42 U.S.C. 2000e(b) (exemption for employers with less than 15 employees); 42 U.S.C. 2000e(f) (exemption for staffs of public officials). Thus, as with the tax exemption considered in *Walz*, religious organizations are not alone in being accorded special treatment. And, although government regulation of discrimination in private employment is of a relatively recent vintage, Congress recognized the propriety of some form of exemption for religious organizations as soon as it adopted a prohibition against religious discrimination. That exemption plainly is justified by the same fear of retaliation against religion that the Court cited in *Walz* (see 397 U.S. at 674). The authority to investigate a religious organization and override an organization's personnel decisions obviously could be applied by hostile plaintiffs —or a government agency—in a manner that disrupts the religious organization.

ical community" (*Lynch* v. *Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring)). In *Larkin* v. *Grendel's Den*, 459 U.S. 116 (1982), for example, the Court held that a statute giving churches the power to bar the issuance of liquor licenses to establishments located near them violated the Establishment Clause because it "enmesh[ed] churches in the exercise of substantial governmental powers." 459 U.S. at 126; see also *School District* v. *Ball*, slip op. 16 (if the government action "conveys a message of government endorsement or disapproval, a core purpose of the Establishment Clause is violated"). Section 702 neither permits religious organizations to exercise governmental authority nor confers upon government the authority to regulate religious organizations; and the exemption does not convey a message of government endorsement of religion. Far from symbolizing the union of church and state, it reinforces the noninterference of one in the other that is at the heart of the Religion Clauses.

Third, Section 702 does not result in government financial support of religious activities. See *School District* v. *Ball*, slip op. 11-12. The district court suggested (J.S. App. 69a-70a) that Section 702's exemption for secular activities would enable religious organizations to expand their business interests, but failed to offer any explanation for that conclusion. The district court did not expressly find that the exemption provides religious employers with any financial advantage over secular competitors and nothing in its opinion—or in the record in this case—supports that conclusion.[18] Indeed, the limited

[18] Appellees have attempted (Mot. to Aff. 17, 25-26) to support the district court's intimation that Section 702 confers a financial benefit on religious organizations by arguing that the Church's tithing obligation—enforced through the threat

scope of the exemption weighs against a finding of financial advantage. Religious organizations remain subject to Title VII's prohibition against discrimination based on race, color, national origin and sex and are required—like all other covered employers—to report the race, color, national origin and sex of their employees to the Equal Employment Opportunity Commission (29 C.F.R. 1602.7).[19]

Even if the district court had identified some incidental financial benefit resulting from Section 702, moreover, that fact would not render the exemption violative of the Establishment Clause. This Court has rejected claims that incidental financial benefits caused by an exemption from a generally applicable government burden automatically render the exemp-

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of discharge from employment—produces an economic benefit to the Church. But the district court did not refer to tithing and nothing in the record indicates the extent of the Church's financial gain from tithing, whether the Church lawfully could accomplish the same result by reducing salaries paid to Church members, and whether any financial gain outweighs the losses suffered as a result of the limitation of the labor pool to those individuals who are willing to tithe and obey all other Church requirements necessary to obtain a temple recommend.

More fundamentally, however, the constitutionality of Section 702 should not turn on the practices or belief of a particular religious group. Such a result would require courts, with very little guidance, to make myriad decisions not only whether a particular activity was sufficiently religious to merit exemption from Title VII's ban against religious discrimination, but also to evaluate particular religious practices. In addition, Section 702 then might be found constitutional as applied to some religious groups and unconstitutional as to others, potentially implicating the Establishment Clause's command of neutrality among religions (see page 32, *supra*).

[19] No employer, religious or secular, is required to report the religion of its employees.

tion invalid. Thus, the tax exemption approved in *Walz* v. *Tax Commission*, *supra*, plainly conferred a far greater financial benefit than religious organizations could secure as a result of the narrow exemption permitted by Section 702. Yet the Court in that case rejected the argument that the tax exemption afforded impermissible financial assistance to religion. 397 U.S. at 675; see also *Mueller* v. *Allen*, 463 U.S. 388 (1983) (tuition tax deductions); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (exemption of church-operated schools from unemployment taxes); cf. *Witters* v. *Washington Department of Services for the Blind*, No. 84-1070 (Jan. 27, 1986) (extension of aid pursuant to state vocational rehabilitation program to finance petitioner's theological training at a Christian college). The same reasoning requires the rejection of the argument that Section 702 is unconstitutional because it confers a financial benefit upon religious organizations.

Fourth, Section 702 does not authorize the use of government power to coerce an individual's religious choice. The goal of the Religion Clauses is to enable each individual to adopt and practice the religion of his choice—or no religion at all—without interference by the government. *Wallace* v. *Jaffree*, slip op. 11-16; *Wooley* v. *Maynard*, 430 U.S. 705, 714-715 (1977); *Marsh* v. *Chambers*, 463 U.S. at 803 (Brennan, J., dissenting). Section 702 does not enable a religious organization to invoke the authority of government to compel adherence to religious requirements. Section 702 instead is a restriction on the use of government power; government has withdrawn and permitted a religious organization to determine according to the dictates of its faith whether to consider religion in employment decisions.

The district court observed (J.S. App. 70a, 72a-73a) that Section 702 permits a religious organization to use employment opportunities to require adherence to its religious beliefs, and found that effect to be constitutionally impermissible. Of course, the religious organization's ability to coerce its employees is limited. An individual can choose to seek other employment rather than satisfy a religious requirement.[20]

More fundamentally, the particular effect cited by the district court—the fact that a religious organization may influence its employees' religious choices by discriminating in employment on the basis of religion—is not an effect that is relevant under the Establishment Clause because it is not the result of an affirmative grant of authority by Section 702 or any other federal statute. Prior to the enactment of Title VII, *all* private employers were free to dis-

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[20] The statute in *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), was found to violate the Establishment Clause because it had the primary effect of "advanc[ing] a particular religious practice" (472 U.S. at 710)—Sabbath observance—and forced private individuals to accommodate this religious practice without regard to the burden imposed upon those private individuals. The statute required "[t]he employer and others [to] adjust their affairs to the command of the state" and violated the principle that no individual has " 'the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.' " *Ibid.* (citation omitted); see also *id.* at 708 ("Government * * * must take pains not to compel people to act in the name of any religion".). Section 702, by contrast, does not endorse any specific religious practice and does not compel any private individual to conform his conduct to religious requirements. It thus mandates separation between government and religion rather than government intervention with respect to religious concerns.

criminate on the basis of religion; Section 702 simply exempts religious organizations from the antidiscrimination requirement of Title VII.[21] The effect cited by the district court thus flows from the government's decision not to exercise its regulatory authority. Since Congress's failure to prohibit discrimination prior to 1964 did not constitute an establishment of religion, its decision not to prohibit such discrimination now cannot offend the Establishment Clause.

Indeed, the district court's conclusion rests upon reasoning similar to an argument rejected by this Court in *Walz* v. *Tax Commission*, *supra*. The tax exemption in *Walz* was attacked as the equivalent of a direct money subsidy to religious organizations; the Court replied that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees on the public payroll.'" 397 U.S. at 675; see also *id.* at 690 (Brennan, J., concurring) (distinguishing subsidies from exemptions on the ground that "[a] subsidy involves the direct transfer of public monies" while an exemption acts "only passively, by relieving a privately funded venture of the burden of paying taxes"). So, too, here the absence of government regulation must be distinguished from the affirmative invocation of government power. Since Section 702

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[21] The fact that Congress enacted a narrower exemption in 1964 and adopted the broader exemption in 1972 does not alter this analysis. Cf. *Crawford* v. *Los Angeles Board of Education*, 458 U.S. 527 (1982).

constitutes the former rather than the latter, it does not violate the Establishment Clause.[22]

Claims under the Establishment Clause generally require the Court to "reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that * * * total separation of the two is not possible" (*Lynch* v. *Donnelly*, 465 U.S. at 672). Here, however, there is no "inescapable tension" to resolve. The sole effect of Section 702 is to promote the disassociation of government and religion that is the goal of the Religion Clauses. The statute therefore cannot violate the Constitution.[23]

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[22] Rather than stating an effect cognizable under the Establishment Clause, appellees' argument on this point resembles an effort to invoke equal protection principles. Thus, appellees argue (Mot. to Aff. 18) that Congress was not free to draw a distinction between religious employers and other employers. Such a claim relating to Congress's authority to distinguish among groups is more properly addressed under equal protection principles. As we have shown, accommodation of religion is a permissible, indeed a constitutionally sanctioned goal, and a distinction that furthers that goal cannot constitute a denial of equal protection. Since Section 702 effects just such an accommodation (see pages 26-31, *supra*), the statute does not contravene equal protection principles.

[23] Justice O'Connor has suggested that "[i]n assessing the effect of [a statute that lifts a government-imposed burden upon the free exercise of religion]—that is, in determining whether the statute conveys [to an objective observer] the message of endorsement of religion or a particular religious belief—courts should assume that the 'objective observer' is acquainted with the Free Exercise Clause and the values it promotes" (*Wallace* v. *Jaffree*, slip op. 17 (concurring opinion)). Section 702 plainly does not have an impermissible effect under this standard. An objective observer would view the statute as an effort to disassociate government and religion

### B. Section 702 Therefore Satisfies The Test Set Forth In *Lemon* v. *Kurtzman*

In *Lemon* v. *Kurtzman*, *supra*, this Court set forth a three-part standard for evaluating claims under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion' " (403 U.S. at 612-613 (citations omitted)). While we have in the past indicated uneasiness with the *Lemon* standard as applied to government accommodations of religion,[24] it is clear that Section 702 satisfies each of these requirements.

First, Section 702 serves a permissible legislative purpose. As we have discussed (see pages 15-17), Congress enacted the exemption in order to avoid government interference with the personnel decisions of religious organizations, thereby furthering religious autonomy. As the district court in this case noted, the "legislative goal of assuring that the government remains neutral and does not meddle in religious affairs by interfering with the decision-making process in religions is a valid secular purpose" (J.S. App. 40a).[25]

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and thereby eliminate any possible burden upon a religious organization's ability to act in accordance with the dictates of its faith and its religious identity and mission.

[24] See, *e.g.*, U.S. Br. at 24-30, *Estate of Thornton* v. *Caldor, Inc.*, *supra*.

[25] Appellees contend (Mot. to Aff. 10-11) that Congress's purpose was not to avoid interference in religious affairs because on that rationale it would have completely exempted religious organizations from Title VII; they assert that Congress intended to "invite[] religious employers to coerce reli-

Although the Court has not expressly stated that a statute designed to accommodate religion has a purpose that is permissible under *Lemon*, it has strongly indicated that such a purpose does not violate the Establishment Clause. *Wisconsin* v. *Yoder*, 406 U.S. at 234-235 n.22; *Walz* v. *Tax Commission*, 397 U.S. at 673-674; cf. *Ansonia Board of Education* v. *Philbrook*, No. 85-495 (Nov. 17, 1986). While a narrow reading of the secular purpose requirement might be taken to invalidate any exemption of religious observers from generally applicable governmental obligations, given the underlying purpose to promote the exercise of religion free from government interference (see *Wallace* v. *Jaffree*, slip op. 16 (O'Connor, J., concurring opinion)), such a conclusion would defeat the central aim of the Religion Clauses. The Establishment Clause itself seeks, most fundamentally, to avoid the interference of government with religion, and this Court's decisions make quite clear that a statute designed to avoid interaction of government and religion *furthers* that goal. See pages 18-25, *supra*. The *Lemon* test should be construed to reflect the permissibility of such a legislative purpose.[26]

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gious loyalty through the economic power that employment gives an employer over an employee." As we have discussed (see note 13), Congress could reasonably conclude that its goal of restricting interference in religion could be met by an exemption limited to claims of religious discrimination. Moreover, as the district court found, "there is no indication that Congress amended Section 702 for a religious purpose or to promote religion or religious beliefs" (J.S. App. 40a (footnote omitted)).

[26] A narrow definition of the purposes permissible under the *Lemon* test would tend to the absurd result that an accommodation of religion required by the Free Exercise Clause

Similarly, as to the second prong of the *Lemon* test, the principal effect of Section 702 is to eliminate government interference with religious organizations by excluding them from coverage under regulatory legislation. In particular, the exclusion from Title VII coverage of all employment decisions of religious entities that are based on the employee's religion avoids substantial litigation, frequently culminating in the substitution of a court or agency judgment for that of a church, on a subject often significantly related to religious belief and practice. See pages 26-31, *supra*. That effect must be permissible if the Establishment Clause is not to defeat its own purpose of avoiding entanglement and interference with religion.

Finally, Section 702 does not contravene the third part of the *Lemon* standard because it avoids rather than causes an entanglement of government and religion. The Court observed in *Lemon* that "[i]n order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority" (403 U.S. at 615).

Although Section 702 arguably benefits religious institutions by freeing them from a legal restriction on their conduct, that fact cannot be dispositive of

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automatically would run afoul of the Establishment Clause because, by definition, the purpose of such an accommodation, is to facilitate the free exercise of religion. In addition to producing such a constitutional impasse, rejection of accommodation as a permissible goal would conflict with this Court's decisions upholding discretionary accommodations of religion (see pages 24-25, *supra*).

the entanglement inquiry without invalidating all accommodations of religion. Moreover, the statutory exemption provides no affirmative aid to religious organizations, but simply reflects government's decision not to regulate one aspect of their activities. Such forbearance minimizes the interaction between government and religion, and thus avoids rather than exacerbates any possible entanglement. As the district court concluded, "Section 702 does not require the type of comprehensive, discriminatory and continuous state or federal surveillance that was condemned in cases such as *Lemon*. * * * [It] ensure[s] that the government and courts do not go through the rigors of inspecting and analyzing whether the activities in which a religious entity is engaging are religious or secular, thus avoiding an intimate and continuing relationship between church and state" (J.S. App. 74a-75a (footnote omitted)).[27]

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[27] The district court found that Section 702 enables religious organizations to exercise "coercive power" over their employees' beliefs and that this conclusion supported a "finding of excessive entanglement" (J.S. App. 74a). As we have discussed, the district court's assessment of the effect of the statute is in error.

We take no position regarding the question presented by the private appellants regarding the availability of a back pay remedy in the circumstances of this case.

## CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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JANUARY 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181493 40171